Supreme Court, U.S.
FILED
NOV 23 2005
OFFICE OF THE CLERK

No. 04-1527

IN THE

Supreme Court of the United States

S.D. WARREN COMPANY,
Petitioner,

v.

MAINE BOARD OF ENVIRONMENTAL PROTECTION,
Respondent.

On a Writ of Certiorari to the Supreme Judicial Court of Maine

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS AND FOUNDATION FOR ENVIRONMENTAL AND ECONOMIC PROGRESS IN SUPPORT OF PETITIONER

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November 23, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTION PRESENTED

Does the mere flow of water through an existing dam constitute a "discharge" under Section 401, 33 U.S.C. § 1341, of the Clean Water Act, despite this Court's holding last year in *Miccosukee* that a discharge requires the addition of water from a distinct body of water?

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INTERESTS OF *AMICI CURIAE*

The National Association of Home Builders ("NAHB") and the Foundation for Environmental and Economic Progress ("FEEP") have received the parties' written consent to file this brief as *amici curiae* in support of the petitioners. The letters of consent have been filed with the Clerk of the Court.[1]

[1] Pursuant to Rule 37.6 of this Court, *amici* state that their counsel authored this brief and *amici* paid for it. This brief was not written in whole or part by counsel for a party, and no one other than *amici* made a monetary contribution to its preparation.

NAHB represents over 205,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single family homes, but also apartment, condominium, multi-family, commercial, and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. Many of NAHB's members own and develop property. NAHB is therefore concerned with any judicial decision that affects the regulation of land development, including the appropriate jurisdictional reach of the Clean Water Act ("CWA" or "Act"). NAHB has participated in most of this Court's cases construing the reach of the CWA, as well as cases involving government regulation of the use and development of land.[2]

FEEP, established in 1989, is a national coalition of large land-holding companies founded to advance balanced federal

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[2] NAHB has been before the Court as an *amicus curiae* or as "of counsel" representing the interests of property owners in numerous cases, including *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); and *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). NAHB and FEEP are also submitting *amici* briefs in two CWA cases now pending before the Court, *United States v. Rapanos* and *Carabell v. U.S. Army Corps of Engineers*, consolidated case Nos. 04-1034 and 04-1384.

environmental law and policy regarding the use and development of private land. FEEP members own property in forty-four states and frequently must obtain permits under the CWA to manage or develop land.

The central issue in this case—what activity constitutes an "addition" under the CWA for purposes of defining a regulable "discharge" under the Act—is critical in determining the scope of authority of the United States Army Corps of Engineers ("Corps") and the United States Environmental Protection Agency ("EPA") (collectively, the "Agencies") to require *Amici's* members to obtain permits for their projects to provide housing and build communities for the Nation's citizens. *Amici* submit that the Agencies often compel our members to obtain CWA permits for activities that are not properly regulable under the Act.

SUMMARY OF ARGUMENT

The Supreme Judicial Court of Maine's ("SJC") decision in *S.D. Warren* is a radical one. It holds that "water that has left its natural state and has been subjected to man-made control constitutes an 'addition' upon its return to the same navigable waterway." *S.D. Warren Co. v. Bd. of Envtl. Prot.*, 868 A.2d 210, 217 (Me. 2005), *cert. granted in part*, 126 S. Ct. 415 (2005). The SJC posits that the moment water passes through a dam it is subject to "private control" and thus loses its status as "waters of the United States." *Id.* at 216. The subsequent "redeposit" of waters that have "lost their status as waters of the United States" results in an "addition" to the "waters of the United States," which constitutes a discharge. *Id.* In reaching this conclusion, the court makes two fundamental errors.

First, the SJC's holding ignores this Court's decision in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) ("*Miccosukee*"), which held that movement of water within a single water body is not

an addition. By premising CWA jurisdiction on "private control" rather than an "addition" to a "meaningfully distinct" water body, *id.* at 112, the SJC improperly expands the CWA.

Second, the SJC misconstrues decades of settled case law defining "discharge of a pollutant" and sharply limiting the circumstances in which a "redeposit" of indigenous waters can be deemed an "addition." No case relied on by the SJC holds that water flowing through a run-of-river dam constitutes a "discharge." An "addition" of some kind is required to trigger the permit and water quality certification requirements under the CWA.

If water is stirred by a spoon, pushed by an oar, or splashed by a hand, the water could be said to fall within "private control." But such movements of water could not be "additions" and thus "discharges" within the meaning of the CWA.

Requiring S.D. Warren to obtain a water quality certification for the mere movement of water within a single water body exceeds the reach of the Act. Congress did not set out to regulate, under the CWA, the millions of land owners, vessel operators, water suppliers, and others who simply move water in the course of their activities but discharge nothing "into" that water. Rather, it chose to regulate discharges—additions—into the nation's waters. The holding must be reversed.

ARGUMENT

I. THE DECISION BELOW CREATES A NEW "PRIVATE CONTROL" TEST THAT SUBVERTS THE CLEAN WATER ACT'S REQUIREMENT THAT A "DISCHARGE" INCLUDE AN "ADDITION."

S.D. Warren ("Warren") owns and operates five contiguous hydroelectric dams on the Presumpscot River in

Cumberland County, Maine. *S.D. Warren Co. v. Bd. of Envtl. Prot.*, 868 A.2d 210, 213 (Me. 2005), *cert. granted in part*, 126 S. Ct. 415 (2005). The projects operate in the run-of-river mode. *Id.* This means that "the outflow of the project is approximately equal to the inflow on an instantaneous basis." *Id.* n.1.

In 2000, 2001, and 2002, as part of its relicensing with the Federal Energy Regulatory Commission ("FERC"), Warren filed applications, under protest, for water quality certification pursuant to Section 401 of the CWA. *Id.* at 213. Section 401 requires any applicant for a Federal license or permit to conduct any activity, which "may result in any discharge into the navigable waters," to provide the licensing or permitting agency with a certification from the state in which that discharge may occur. 33 U.S.C. § 1341(a)(1).

In April 2003, the Maine Department of Environmental Protection ("DEP") approved water quality certification for the continued operation of Warren's projects, subject to a number of conditions. 868 A.2d at 213. Warren appealed, administratively and within state courts, arguing, among other things, that its operation of the dams does not cause a discharge, and therefore Section 401 water quality certification is not required. *Id.* The DEP decision was upheld at all levels, *id.*, and now this Court has granted certiorari to review the decision of the SJC.

The SJC affirmed the lower court decision. *Id.* at 220. Recognizing that "[a]n 'addition' is the fundamental characteristic of any discharge," *id.* at 215, the SJC concludes that the operation of Warren's dams does result in an addition:

> When a substance is removed from a navigable body of water and then redeposited into that same body of water it constitutes a discharge pursuant to section 502(12), 33 U.S.C.A. § 1362(12). *See Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983) ("The word 'addition' as used in the definition of the

> term, 'discharge,' may reasonably be understood to include 'redeposit.'").

Id. Summing up, the court concludes:

> When "water leaves the domain of nature and is subject to *private control* rather than purely natural processes . . . it has lost its status as waters of the United States." *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1297 (1st Cir. 1996). Because these waters have lost their status as *waters of the United States*, when they are redeposited into the natural course of the river it results in an addition to the *waters of the United States.*

Id. (emphasis on "private control" added).

As *amici* will discuss below, the SJC's new "private control" test is inconsistent with the plain language of the Act and unsupported by the case law. "Private control" is not determinative of whether there is an "addition" and therefore a "discharge."

II. UNDER THE CLEAN WATER ACT, THE TERM "DISCHARGE" IS DEFINED TO INCLUDE "ADDITION."

Congress did not intend the CWA to regulate any and every activity that could impact navigable waters. Although the goals of the CWA are ambitious (to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters . . . ."), Congress did not prohibit all actions that cause some type of environmental damage to an aquatic resource.[3] 33 U.S.C. § 1251(a). The Act's regulatory scheme

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[3] *Save Our Cmty. v. U.S. Envtl. Prot. Agency*, 971 F.2d 1155, 1162-63 (5th Cir. 1992) (absent a discharge, the destruction of a wetland is not regulated by the CWA); *Salt Pond Assocs. v. U.S. Army Corps of Eng'rs*, 815 F. Supp. 766, 778 (D. Del. 1993) ("[T]he reach of the CWA extends only to the *discharge* of pollutants into navigable waters . . . ."); *United States v. Lambert*, 589 F. Supp. 366, 373 (M.D. Fla. 1984) (excavation of lake not a violation of the CWA).

is narrower: It addresses water pollution by regulating actions that "discharge" or "add" "pollutants." *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1404 (D.C. Cir. 1998).

The term "pollutant" is inextricably tied to discharges. A substance meets the Act's definition of "pollutant" only if it is "discharged into water." 33 U.S.C. § 1362(6). Water itself is not a pollutant. *Bettis v. Town of Ontario,* 800 F. Supp. 1113, 1119 (W.D.N.Y. 1992). The statutory term "pollution," by contrast, is much broader and is not tied to discharges. "The term 'pollution' means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(19). Congress addressed "pollution" through a host of non-regulatory programs. The regulatory program is carefully targeted: It prohibits the discharge of pollutants through point sources into navigable waters except in compliance with permits issued in accordance with the CWA. *Id.* at. § 1311.[4]

Section 402 provides one exception to the discharge prohibition, authorizing EPA and delegated States to issue permits for discharges of pollutants, such as industrial and municipal waste. *Id.* at § 1342. Section 404 is another exception to the discharge prohibition, empowering the Corps to issue permits for the "discharge of dredged or fill material into the navigable waters." *Id.* at § 1344.

The existence of a "discharge" is the critical, deciding factor in determining whether an activity is regulable under the Act. The term "discharge" by itself is defined by

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[4] *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987) ("One of the primary features of the [CWA is] a federal permit program designed to regulate the discharge of polluting effluents."); *Rueth v. U.S. EPA*, 13 F.3d 227, 229 (7th Cir. 1993) ("To achieve the purposes of the Act, Congress prohibited discharge of any pollutants, including dredged or other fill material, except in accordance with the Act.").

reference to "discharge of a pollutant." *Id.* at § 1362(16) ("'[D]ischarge' when used without qualification includes a discharge of a pollutant"). The term "discharge of a pollutant," in turn, "means . . . any addition of any pollutant to navigable waters from any point source . . . ." *Id.* at § 1362(12). As the U.S. Court of Appeals for the District of Columbia Circuit has observed, this statement of inclusion provides "the nearest evidence we have of definitional intent by Congress. . . . ." *North Carolina v. FERC*, 112 F.3d 1175, 1187 (D.C. Cir. 1997), *cert. denied*, 522 U.S. 1108 (1998).

> It would seem to us apparent that since Congress meant "discharge" to *include* "discharge of a pollutant" then Congress intended the word "discharge" to be defined in the *inclusive* use consistently with the *included* use. Therefore, if "discharge of a pollutant" requires addition, then the inclusive understanding of "discharge" also requires an addition.

Id. at 1187 n.4 (emphasis added).

III. *MICCOSUKEE* INSTRUCTS THAT THE TRANSFER OF WATER IS NOT AN "ADDITION" UNLESS WATER IS TRANSFERRED BETWEEN TWO "MEANINGFULLY DISTINCT" WATER BODIES.

The SJC found that the Presumpscot River water lost its status as "waters of the United States" when it passed into private control (through the dam) and then became an "addition" when it was "redeposited" into the very same river at the same flow on the other side of the dam. 868 A.2d at 215-16.

A fundamental flaw in the SJC's decision is its failure to address this Court's holding in *Miccosukee*. In *Miccosukee*, the Court considered what constitutes an "addition" in the context of Section 402 of the CWA, where water was pumped from a canal to a water conservation area sixty feet away. 541 U.S. at 100, 104-05. This Court confirmed that a

"discharge of a pollutant" occurs only when the water body receiving the water is "meaningfully distinct" from the water body that was the source of the water. *Id.* at 112. The Court further suggested that removing water and then returning it to the same water body does not constitute an "addition" of a pollutant under Section 402. *Id.* Thus, if the canal and the water conservation area are not "meaningfully distinct" water bodies, the pumping of water from one location to another would not "add" anything to the receiving water and there is no discharge. *Id.*

After this Court's decision in *Miccosukee,* EPA issued an "Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers." Memorandum from Ann R. Klee, General Counsel, and Benjamin H. Grumbles, Assistant Administrator for Water, U.S. EPA, to Regional Administrators (August 5, 2005), *available at* http://www.epa.gov/ogc/documents/water_transfers.pdf. The Agency Interpretation defines "water transfers" as "any activity that conveys or connects navigable waters (as that term is defined in the CWA) without subjecting the water to intervening industrial, municipal, or commercial use." *Id.* at 1. EPA states:

> We emphasize, for purposes of clarity, that a water transfer occurs between two "waters of the United States." Accordingly, the movement of water through a dam is not a water transfer because the dam merely conveys water from one location to another within the same waterbody *(although the movement of water through a dam also does not require an NPDES permit because no "addition" has occurred).*

Agency Interpretation at 18 n.18 (emphasis added).

It is undisputed that the water above, below, and within each dam of the S.D. Warren project is part of the same body of water, the Presumpscot River. 868 A.2d at 213. If merely controlling water constituted an "addition" resulting in a

"discharge" under the CWA, then anyone who moved water from one place to another, even if the water was not a waste product and the controller introduced no new substances of any kind to the water, would need a permit or water quality certification. There is no support in the Act for such an interpretation and the SJC cites none.

IV. THE CASES CITED BY THE SUPREME JUDICIAL COURT OF MAINE DO NOT SUPPORT THE "PRIVATE CONTROL" TEST.

The SJC pointed to "private control" as decisive to its conclusion that there was an "addition" to the Presumpscot River. 868 A.2d at 215-16. No case suggests, however, that private control is an "addition." If control were the determining factor, virtually any movement of water—rowing a boat, skipping a stone—would be deemed a discharge under the CWA.

A. "Private Control" of Water Does Not Make a "Redeposit" a "Discharge."

In its analysis of what constitutes a "discharge," the SJC cites the observation made by the U.S. Court of Appeals for the Fifth Circuit in *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983), that "[t]he word 'addition,' as used in the definition of the term, 'discharge,' may reasonably be understood to include 'redeposit.'" 868 A.2d at 215 (quoting *Avoyelles*, 715 F.2d at 923). The SJC relies on that observation to support the proposition that a "redeposit" of river water, back to the same river from which it originated, constitutes a "discharge." *Id.*

The SJC seems to be saying that a redeposit is *per se* a discharge. But that is reading more into *Avoyelles* than the Fifth Circuit said. That a redeposit *can* be an addition does

not mean a redeposit is *always* an addition.[5] In *Avoyelles*, the Fifth Circuit held that a large-scale mechanized landclearing project in Louisiana, where stumps and ashes from forested trees were placed in sloughs to level the land, constituted a discharge of fill material. 715 F.2d at 901.

Indeed, the U.S. Court of Appeals for the District of Columbia Circuit rejected an agency rule that would have treated all redeposits as "discharges." *Nat'l Mining Ass'n*, 145 F.3d 1399 (D.C. Cir. 1998). The challenged rule would have regulated "*any* redeposit," but the court distinguished *Avoyelles* and held that the Agencies' rule "outruns [their] statutory authority." *Id.* at 1405. "[T]here can be [no] addition of [a pollutant] when there is no addition of material." *Id.* at 1404. In fact, not all redeposits are discharges because the CWA defines the term "discharge" as an "addition," and

> the straightforward statutory term "addition" cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back. Because incidental fallback represents a net withdrawal, not an addition of material, it cannot be a discharge. . . . In fact the removal of material *from* the waters of the United States, as opposed to the discharge of material *into* those waters, is governed by a completely independent statutory scheme.

Id. (emphasis added) (citations omitted).

The SJC's reliance on *Avoyelles* is further cast in doubt because it is questionable whether *Avoyelles* survives

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[5] Moreover, contrary to the SJC's holding, the Presumpscot River water was never "redeposited," as it never left the river. Because the river water flows continuously through the dams on the same river, it is erroneous to describe the water as being lifted out, changing control, being redeposited, and then again changing control. Thus, redeposit cases, including *Avoyelles*, are inapposite.

Miccosukee. Is regulation of any "redeposit," as discussed in *Avoyelles*, appropriate, given this Court's holding in *Miccosukee*? *Miccosukee* instructs that a "discharge" occurs when there is an "addition" to a "meaningfully distinct" water body. "Redeposit" does not move water, or material, to a meaningfully distinct water body. *See, e.g., Nat'l Mining Ass'n*, 145 F.3d at 1404 (holding that there can be no "addition" of a pollutant without an addition of material). It simply returns the water to the same water body from which it originated. Therefore, redeposit cannot be an "addition" under *Miccosukee*.

B. Mere Flow of Water Through a Dam Is Not an "Addition."

Moreover, both the U.S. Court of Appeals for the D.C. Circuit and the U.S. Court of Appeals for the Sixth Circuit have recognized that Section 402 permits are not required for operation of dams where there is no addition of a pollutant.

In *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), the D.C. Circuit held that no addition of a pollutant occurs where water flowing from a reservoir behind a dam passes through the dam and continues with "dam induced water quality changes" into the stream below because no pollutant is introduced "into water from the outside world." 693 F.2d at 161-175. Because the dam does not "add" a pollutant to that water, its operation does not constitute a "discharge" requiring a Section 402 permit. *Id.* at 175.

The Sixth Circuit took the same approach in *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988), where it held that a Section 402 permit is required only where there is an addition of a pollutant from a point source. Finding that the dam "merely transmit[s] the water coming into it, in whatever altered form," *id.* at 586, the Sixth Circuit held that no addition of pollutants occurred

because the facility "merely changes the movement, flow, or circulation" of the water, and the water "never loses its status as water of the United States" during the diversion. *Id.* at 588-89.

The D.C. Circuit and the Sixth Circuit concluded that in order to find the required "addition" that defines a "discharge," something must be introduced into navigable water from the outside world.[6] *Consumers Power*, 862 F.2d at 584-86; *Gorsuch*, 693 F.2d at 174-75.

C. There Is No "Addition" in a Transfer Between Two Water Bodies Unless New Constituents Are Introduced into the Receiving Water.

The common thread from *Miccosukee* and numerous decisions from the federal courts of appeals analyzing the jurisdictional purview of Sections 401, 402, and 404 of the CWA is that the CWA term "discharge" necessarily includes "addition." Mere movement within a single water body is not an "addition" and does not require a permit or water quality certification.

The SJC, however, makes "private control" decisive, citing *Dubois v. U.S. Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996), *cert. denied sub nom. Loon Mountain Recreation Corp. v. Dubois*, 521 U.S. 1119 (1997). "When 'water leaves the domain of nature and is subject to private control rather than purely natural processes . . . it has lost its status as waters

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[6] Consistent with these decisions, the U.S. Court of Appeals for the D.C. Circuit held in *North Carolina v. FERC*, 112 F.3d 1175 (D.C. Cir. 1997), that a *decrease* in the amount of water flowing through a dam is not an "addition" for state certification purposes of Section 401 of the CWA. In *Alabama Rivers Alliance v. FERC*, 325 F.3d 290 (D.C. Cir. 2003), the D.C. Circuit held that an *increase* in the flow of water through a dam is an "addition" that may result in a discharge under Section 401. In each case, whether there was an "addition" was the critical factor, and control was not considered.

of the United States.'" 868 A.2d at 215-16 (quoting *Dubois*, 102 F.3d at 1297). But the SJC takes *Dubois* out of context, overstates the "private control" aspect of *Dubois*, and overlooks the fact that the *Dubois* formulation was conjunctive: "water leaves the domain of nature *and* is subject to private control . . . ." *Dubois*, 102 F.3d at 1297 (emphasis added).

Dubois involved a ski resort operator that pumped water from a polluted river into a less-polluted pond to operate its snowmaking equipment. The First Circuit held that the transfer of polluted water from the East Branch of the Pemigewasset River to a second, distinct, less-polluted water body above, Loon Pond, constitutes an "addition" of pollutants to the destination water body. 102 F.3d at 1299.

The snowmaking activity in *Dubois* could not be less like the water flowing through the run-of-river dam in *S.D. Warren*. In *Dubois*, the water was transferred through snowmaking pipes from the river, used in the commercial snowmaking operation, and then, after its use, dumped in the pond. In *S.D. Warren*, the water runs through the dam in constant motion (the water is not lifted out, processed, and then returned). It does not "leave the domain of nature."[7] 102 F.3d at 1297.

Moreover, nothing in *Dubois* suggests that "control" alone could make water movement an "addition." Instead, the court emphasized that the two bodies of water were distinct and that the river water would never flow naturally to the pond. It was that difference that made the pumping an "addition." *Id.* at 1296-98. Because *S.D. Warren* only involves movement of water within the same water body, and the Presumpscot River, left to its own devices, will naturally flow downstream, the SJC's reliance on *Dubois* is wrong.

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[7] *See supra* note 5.

V. THE CLEAN WATER ACT WILL CONTINUE TO REGULATE "DISCHARGES" NOTWITHSTANDING THIS COURT'S REJECTION OF THE "PRIVATE CONTROL" TEST.

The Court need not be concerned that if it does not accept the SJC's "private control" test, the goals and policies of the CWA will somehow be undermined. The pre-*Warren* case law shows that the CWA will continue to be implemented to its fullest.

Though not cited by the SJC, the U.S. Court of Appeals for the Second Circuit, in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001), has concluded that the jurisdictional reach of the CWA extends to the transfer of water where new constituents are added from one unconnected water body to another. In *Catskill Mountains*, a water diversion system was used to deliver drinking water to New York City. The system diverted water from a reservoir through a tunnel and into a creek, which in turn emptied into another reservoir. Under natural conditions, the water from the reservoir would never reach the creek. The Second Circuit held that the conveyance of water containing pollutants from one water body to another distinct, hydrologically unconnected water body constitutes an addition, and thus requires a permit for discharge under CWA Section 402.

The court emphasized that mere recirculation, on the other hand, is not an addition:

> If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not "added" soup or anything else to the pot (beyond, perhaps, a *de minimis* quantity of airborne dust that fell into the ladle). In requiring a permit for such a "discharge," the EPA might as easily require a permit for Niagara Falls.

Catskill Mountains, 273 F.3d at 492. And the court found, in *Catskill Mountains*, that a permit was required where an

addition was made, consistent with the comprehensive regulatory provisions of the CWA. Because the S.D. Warren project involves the recirculation of water where nothing is added, there is no discharge.

Merely taking water out of a water body and redepositing that same water into the same water body cannot constitute an "addition." CWA Section 301(a) is triggered by discharges, not control of water. The "private control" test is not necessary to effectuate the goals of the CWA. Decisions interpreting Sections 401, 402 and 404 hold that where an "addition" is made, a permit or water quality certification is required. The test enunciated by the *Miccosukee* Court requires an "addition" of new constituents between "meaningfully distinct" water bodies. The SJC's decision in *S.D. Warren*, which premises CWA jurisdiction on a "redeposit" into a water body that is not "meaningfully distinct," where no "addition" has occurred, is not in keeping with the Act and these decisions.

CONCLUSION

For all of the foregoing reasons, the Maine Supreme Judicial Court's decision should be reversed.

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November 23, 2005

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